

OFFICE OF THE GENERAL COUNSEL
Division of Operations-Management

MEMORANDUM OM 10-13(CH)

November 3, 2009

TO: All Regional Directors, Officers-In-Charge,
and Resident Officers

FROM: Richard A. Siegel, Associate General Counsel

SUBJECT: Casehandling Regarding Application of Spielberg/Olin standards

As you are aware, under the Spielberg/Olin standards, the Board examines four factors in deciding whether to defer to an arbitration award.¹ In recent years, however, the Court of Appeals for the D.C. Circuit has questioned the Board's standards. Rather, the court has proposed that, with limited exceptions, a collective-bargaining agreement provision dealing with conduct protected by the Act, together with a grievance-arbitration clause covering disputes about such a provision constitutes an implied waiver of the statutory right in favor of the contractual provision. Consequently, no separate unfair labor practice issue remains for Board review. See Plumbers & Pipefitters Local Union No. 520 v. NLRB, 955 F.2d 744, 756 (D.C. Cir. 1992) (adopting waiver analysis as basis for review); Titanium Metals Corp. v. NLRB, 392 F.2d 439, 447 (D.C. Cir. 2004). Accordingly, the D.C. Circuit would limit administrative review to whether arbitral procedures were fair and regular and whether the Union violated its duty of fair representation in processing the grievance. Plumbers & Pipefitters Local Union No. 520 v. NLRB, 955 F.2d at 756.

The Supreme Court's recent decision in 14 Penn Plaza, LLC v. Steven Pyett, 129 S. Ct. 1456 (2009), also has potential implications for the Board's deferral policy. There, the Court held that a union-negotiated agreement to arbitrate statutory employment discrimination claims is enforceable as long as any such union waiver of a judicial forum is expressed in clear and unmistakable terms. Id. at 1465, citing Wright v. Universal Maritime Service Corp., 525 U.S. 70, 80 (1998). This conclusion may call into question the D.C. Circuit's theory that statutory rights may be impliedly waived. In addition, the Pyett Court's decision is premised on the arbitrator's authority and obligation to apply statutory, and not merely contractual, norms. Id. at 1471. This approach contrasts with the Board's more limited review of whether the arbitrator "considered" the unfair labor practice issue, that is, whether the arbitral question was factually parallel to the statutory issue and whether the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice. Olin Corp., 268 NLRB 573, 374 (1984).

¹ Specifically, the Board considers whether (1) the arbitration proceedings were fair and regular; (2) all parties agreed to be bound; (3) the Arbitrator "considered" the unfair labor practice issue in that the contractual issue is "factually parallel" to the unfair labor practice issue and the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice charge and (4) the resulting decision is not "clearly repugnant" to the Act. Olin Corp., 268 NLRB 573, 573-574, citing and clarifying Spielberg Mfg. Co., 112 NLRB 1080.

The Supreme Court's and D.C Circuit's approaches do not compel a change to the traditional Spielberg/Olin standards of review. Nevertheless, they raise questions that the Board must answer as it decides whether to defer to an arbitral award. The need for refinement is also prominent because parties can always choose to seek review of a Board decision before the D.C. Circuit.

Accordingly, a new approach to cases involving arbitral deference may be warranted. That approach will be developed based upon a case-by-case review of submissions to the Division of Advice. In light of the importance of these issues, please submit to Advice all cases in which a Region recommends that the General Counsel reject deference to an arbitral award under the Spielberg/Olin framework.

/s/
R.A.S.

cc: NLRBU
Release to the Public

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